Nos. 82-1312, 82-1345, 82-1346

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

UTAH POWER & LIGHT COMPANY, *et al.*, *Petitioners*,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*, *Respondents.*

ALABAMA POWER COMPANY, *et al.*, *Petitioners*,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *Respondent.*

PACIFIC GAS AND ELECTRIC COMPANY, *et al.*, *Petitioners*,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *Respondent.*

On Petitions For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF RESPONDENT CLARK-COWLITZ JOINT OPERATING AGENCY IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly affirmed the Federal Energy Regulatory Commission's construction of the Federal Power Act that in issuing new hydroelectric project licenses after the expiration of an initial license term, the Commission must apply the state and municipal preference specified by section 7(a) of the Act in all cases in which it determines that the state or municipal license application is as equally well adapted in the public interest as the competing applications.

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Respondent Clark-Cowlitz Joint Operating Agency (CCJOA)[2] respectfully requests that this Court deny the

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[1] The American Public Power Association, the Clark-Cowlitz Joint Operating Agency, the City of Bountiful, Utah, and the City of Santa Clara, California, were intervenors in the court of appeals.

[2] The CCJOA is a municipal corporation under the laws of the State of Washington (Wash. Rev. Code § 43.52 (1974)), formed jointly by

petitions for a writ of certiorari,[3] seeking review of the Eleventh Circuit's opinion in this case.

STATUTE INVOLVED

The case involves an interpretation of certain language in Part I of the Federal Power Act (the Act), formerly known as the Federal Water Power Act, 16 U.S.C. § 791. Portions of the Act are reprinted in Utah Power App. 101a-117a. The specific language in question appears in section 7(a) of the Act, 16 U.S.C. § 800(a), set forth in full below:

> In issuing preliminary permits hereunder or licenses where no preliminary permit has been issued and in issuing licenses to new licensees under section [15] the Commission shall give preference to applications therefor by States and municipalities, provided the plans for the same are deemed by the Commission equally well adapted, or shall within a reasonable time to be fixed by the Commission be made equally well adapted, to conserve and utilize in the public interest the water resources of the region; and as between other applicants, the Commission may give preference to the applicant the plans of which it finds and determines are best adapted to

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Public Utility District No. 1 of Clark County, Washington, and Public Utility District No. 1 of Cowlitz County, Washington. The CCJOA is a municipality within the meaning of section 3(7) of the Federal Power Act, 16 U.S.C. §§ 791, 796(7) (1976 & Supp. V 1981).

[3] Petitions have been filed by Utah Power and Light Company, *et al.* (Utah Power), Alabama Power Company, *et al.* (Alabama Power) and Pacific Gas & Electric Company *et al.* (PG&E). In addition, a brief for respondent Federal Energy Regulatory Commission (FERC) has been filed which recommends grant of the petitions for the limited purpose of remand. Our references in this brief to the petitioner's appendix shall be to that of Utah Power, which was the first to be filed in this case.

develop, conserve, and utilize in the public interest the water resources of the region, if it be satisfied as to the ability of the applicant to carry out such plans.

STATEMENT

The delay in filing this opposition has been occasioned by two extensions of time requested by the Commission, during which it decided in executive session to ask the Solicitor General to request this Court to grant certiorari for the purpose of remanding the case to the Commission. The Solicitor General acceded, but only in part, and is suggesting remand to the Eleventh Circuit. We oppose certiorari and remand of any description. The Commission correctly decided the reach of the statute three years ago. It argued that construction vigorously in the court of appeals and was upheld in a unanimous opinion. Substantial and expensive action in reliance on the Commission opinion has been taken by several entities, including CCJOA and the Commission itself.

We think a brief reference to the framework below will assist the Court in its consideration of the unusual, and we think totally inappropriate request for remand. We turn first to that framework, and then to the reasons for denying the writ.

1. Statutory Framework

Under Part I of the Act Congress has vested in the Federal Energy Regulatory Commission (successor to the Federal Power Commission) the authority to license the development of water power projects on waters or lands over which the federal government has jurisdiction. The statutory scheme governing that agency function is straightforward.

The statute provides certain minimum standards against which the Commission, in issuing licenses, must

assess all applications. 16 U.S.C. § 803. The statute further provides guidelines governing the Commission's choice of a licensee where there are competing applications for the same license. 16 U.S.C. § 800. In particular, section 7(a) directs that applications by states and municipalities shall be preferred if they are otherwise equally well adapted, in the Commission's judgment, to serve the public interest. *Id.*

The Commission may issue a license only for a limited term (up to 50 years). 16 U.S.C. § 799. Upon expiration of a license the Federal government may take over a project for its own use, 16 U.S.C. § 807, or through the Commission, may issue a new limited term license—either to the original licensee or to a new one. 16 U.S.C. § 808.

This case involves the statutory criteria governing the selection among competing applicants for a new license at the expiration of the old. The question is whether the Commission is to apply the preference in favor of states and municipalities in every case where there are competing applicants for a new license, or whether, as petitioners contend, that preference applies only in limited circumstances, namely when the original licensee is not seeking a renewal.

2. Proceeding Before The Commission

Upon expiration of a hydroelectric project license originally issued to Utah Power & Light Company, the City of Bountiful, Utah, and UP&L filed competing applications for the new license. Bountiful, a publicly-owned utility or "municipality" within the meaning of the Act, 16 U.S.C. § 796(7), asked the Commission to issue a declaratory order clarifying its entitlement to the statutory preference.

The Commission initiated a generic proceeding, expressly limiting its inquiry to the legal issue of statutory construction. As the Commission stated (Utah Power App. 24a):

> [T]he principal question to be decided is not the policy issue of whether it is factually or politically wise for States and municipalities to have a relicensing preference . . . but the legal issue of whether Congress included such a preference in Section 7 when it enacted the FWPA in 1920.

After extensive briefing and oral argument, the Commission issued its Opinion No. 88 declaring that in issuing new licenses the preference applied in favor of states and municipalities whether or not the original licensee was among the competitors. *Id.* The Commission further found that the state or municipal applicant competing for a new license was entitled to a preference only after the Commission determines that the plans of the state or municipality are, in the language of section 7(a), "equally well adapted." *Id.* The Commission characterized the preference as a "tie-breaker rule." *Id.* at 74a.

3. The Court Of Appeals' Decision

The court of appeals affirmed, holding that the preference "applies in all competitive relicensing cases, not just those where the original licensee is not an applicant." *Id.* at 13a. The court found the Commission's construction "consistent with the statute's language, structure, scheme, and available legislative history," and gave deference to the agency's statutory interpretation absent "compelling indications that it is wrong." *Id.*

The court further held that the preference only applies "in a tie-breaker-situation" (*id.*), a fact considered by the court before it concluded that this case was ripe for review. *Id.* at 6a. The court went on to resolve the legal

issue because, consistent with the Commission's representations, such resolution would "foster effective enforcement and administration by the agency." Utah Power App. 7a.

Rehearing was denied by a unanimous court. *Id.* at 83a.

4. Subsequent Events

The Commission has proceeded toward assessing the merits of competitive relicensing cases consistent with its directive in Opinion No. 88 that "[t]he processing and consideration of the pending applications [competing for new licenses] should go forward in light of this declaratory order." *Id.* at 78a. Thus far one such case, involving the competing new license applications of the Clark-Cowlitz Joint Operating Agency and Pacific Power & Light Company for Merwin Dam in Washington State, has been through adjudicatory hearing. That "Merwin" case, set for hearing by the Commission in September 1981, was recently decided by an administrative law judge,[4] and is presently pending before the Commission.

In the past few weeks, "a majority of Commissioners" decided, in closed session and for reasons not made public, to reverse FERC's posture with respect to the correct interpretation of the Act. FERC Br. 8. Accordingly, the Commission asked the Solicitor General to recommend "that the Court grant the petitions for certiorari, vacate the judgment of the court of appeals, and remand the case to that court with instructions to remand to the Commission for further consideration." *Id.*

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[4] *Pacific Power & Light Co. and Clark-Cowlitz Joint Operating Agency*, 23 FERC (CCH) ¶ 63,037 (April 28, 1983).

REASONS FOR DENYING THE WRIT

The question presented is strictly a legal one, posited by the Commission itself, which was correctly decided. The decision is not in conflict with any other court holding. Moreover, the court of appeals' narrow holding—affirming the application of a statutory preference which comes into play only upon the Commission concluding after adjudication that two competing applications are equal—does not merit this Court's attention; nor does the last-minute reversal of position by the new Commissioner's dictate otherwise.

1. The Court Of Appeals Employed Settled Principles Of Statutory Construction In Correctly Interpreting The Act

The principles invoked to resolve the single question of statutory construction presented here are not out of the ordinary. FERC was confronted with two conflicting interpretations of section 7(a) of the Act. The Commission, construing a statute with which it has had over sixty years' experience, chose the interpretation that makes sense on its face, is consistent with the overall statutory scheme, avoids absurd results, and is exclusively and convincingly sustained by the legislative history. The court of appeals, after independently confirming the Commission's conclusion, unanimously affirmed.

a. Petitioners and respondents offered the court of appeals (and the Commission below) differing interpretations of the following language of section 7(a):

> in issuing licenses to new licensees under Section 15 hereof the Commission shall give preference to applications therefor by States and municipalities. . . .

Respondents urged that the key to understanding the quoted language lies in its initial phrase—"in issuing licenses"—which means "in determining whether to issue

licenses." Respondents therefore offered the following construction of the language in question (R.1202):

> in determining whether to issue licenses to new licensees under Section 15 hereof the Commission shall give preference to applications therefor by States and municipalities.

Under this reading, the preference applies to the decisional process whenever a "new licensee" is among the competing applicants; that is, in every competitive relicensing situation (for every competitive relicensing case will include a potential new licensee). Thus, in determining whether to issue a license to a new licensee under Section 15—a potential inherent in *every* competitive relicensing situation—the Commission shall give preference to states and municipalities. The foregoing argument, specifically made by the Commission itself in the court of appeals, means in short that upon relicensing, if there is a competing municipal applicant the preference must be applied.

Petitioners have differed among themselves as to the meaning of the language in question. At one point one of the petitioners urged, consistent with respondents, that the words, "In issuing licenses to new licensees under Section 15" meant "In determining whether to issue licenses to a new applicant under Section 15." R.1285. At other points petitioners have simply ignored the phrase "in issuing licenses" and read section 7(a) as though it said:

> in issuing licenses to new licensees under Section 15 hereof, the Commission shall give preference to applications therefor by states and municipalities "only

> against applicants seeking the right to operate an existing project for the first time."[5]

Those last fifteen words are not in the Act, and there is no reason to read them in.

As a general proposition petitioners all read the language in question as conferring a preference which applies "against" a limited class. Thus they view the reference to "new licensee" as meaning that the preference applies "solely against applicants *other than* 'original licensees'." Utah Power Pet. 4.

There is no reason to read the language petitioners' way, as limiting the entities which the preference would affect.[6] We have shown above that the words "in issuing licenses to new licensees under Section 15 hereof" simply identify the circumstance in which the preference applies—*i.e.*, in the process of determining whether to issue a license to a new licensee. The preference applies whenever the Commission considers competing applications under section 15; there is no exception which *ipso facto* cancels the preference whenever the original licensee chooses to apply again.

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[5] The portion enclosed in quotations is from Utah Power's initial brief to the court of appeals (Ct. App. Br.) at page 10. PG&E's position was similar. It read the section 7(a) language as saying (PG&E Ct. App. Br. at 11): "The municipal preference applies only against new licensees and not against an original licensee." Alabama Power reached the same result (Alabama Power Ct. App. Br. at 4): "the relicensing preference in Section 7(a) does not apply against the original licensee."

[6] Indeed, petitioners' reading reverses the natural sense of the word "preference." By focusing on the object rather than the recipient, petitioners read the statute as if it conferred a narrow prejudice or disadvantage *against* a particular class of applicants rather than a broad preference *in favor of* states and municipalities.

In these circumstances the court properly found no basis for petitioners' claim that the construction of section 7(a) must be resolved their way without resort to anything beyond the face of the statute. *See e.g., United States* v. *Public Utilities Commission of California*, 345 U.S. 295, 312-13 (1953), where this Court looked to the statutory scheme and the legislative history in construing a much simpler term ("person") under the Act. The propriety of the court's (and the Commission's) rejection of petitioners' narrow "plain meaning" approach is underscored by the fact that the petitioners could not even agree among themselves on a construction.

b. The court of appeals further found that respondents' construction is consistent with the statutory scheme while petitioners' construction is not. Section 7(a) lays down the substantive standards governing the Commission's choice of applicants in three competitive licensing situations. "As to all three, the Act clearly gives two different preferences" (Utah Power App. 9a): 1) municipal applicants are preferred if their plans are found "equally well adapted" as those of competing private applicants, and 2) as between other applicants preference may be given to the applicant whose plans are "best adapted." *Id.* Under the construction of section 7(a) affirmed by the court of appeals, "those preferences cover all situations concerning competing applications" *(id.)*, a natural and logical scheme.

Petitioners' interpretation distorts that natural scheme. Under petitioners' view, the Act's preferences apply only when the original licensee is not among the applicants. The result is that in any case in which the original licensee decides to compete the Act provides no standard for choosing among the competing applicants. The court, rejecting that on-again, off-again application

of the Act's preferences, properly refused to impute to Congress "a result which would cause administration of the Act by the Commission to be confusing and sporadic." *Id. See United States* v. *Powers*, 307 U.S. 214, 217 (1939) ("There is a presumption against a construction which would render a statute ineffective or inefficient . . . .")

Moreover, petitioners' interpretation gives the standards of section 7(a) no practical application. Under their theory, the only occasion to apply section 7(a)'s standards on relicensing is when the original licensee chooses not to reapply. But as a practical matter that will happen only where the incumbent finds the project not worth operating further.[7] Thus, as the court of appeals concluded, "states and municipalities realistically would have no preference at all because a preference to a losing project is worthless." Utah Power App. 10a. The court therefore followed long accepted principles counseling against a construction which renders inoperative major portions of the statute's terms. *Colautti* v. *Franklin*, 439 U.S. 379, 392 (1979).

Finally, the court (and Commission) noted that petitioners' interpretation led to a patent absurdity. Under petitioners' theory the preference would operate with full

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[7] One petitioner attempts to illustrate how, notwithstanding its crabbed reading of the Act, "[t]he preference will apply to projects of 'worth.' " PG&E Pet. 24, n. 36. Two of its illustrations ((1) where the original licensee is ruled out by the Commission and (2) where the original licensee refuses to accept the Commission's license terms) are inapt. These assume the original licensee *is* an applicant, in which case section 7(a)'s preferences do not apply according to petitioners' reading of the Act. The other example (where a non-utility licensee chooses not to reapply) serves only to illustrate the point that petitioners read the preference as applying only in remote and far-fetched circumstances—hardly a likely basis for the detailed provisions of section 7(a).

force if a state or municipality entered a relicensing competition in which the original licensee had not applied; but the state or municipality which had itself been the original licensee would lose that preference if, as petitioners claim, the preference does not operate when the original licensee is involved in the competition. Neither the court nor the Commission could see any sense to an interpretation in which a state or municipal applicant would be prejudiced simply because it was the original licensee. Here again, well settled principles of statutory construction support the result reached. *United States* v. *Turkette*, 452 U.S. 576, 580 (1981) ("[A]bsurd results are to be avoided and internal inconsistencies in the statute must be dealt with.")

c. Both the Commission and the court of appeals found that the legislative history of the Act supports only one conclusion—that section 7(a)'s preference puts states and municipalities above *all* competitors for a new license.

As originally introduced in Congress, the bill provided:

> in issuing licenses hereunder, the commission may in its discretion give preference to applications for licenses by States and municipalities.

H.R. Rep. No. 715, 65th Cong., 2d Sess. 24 and 33 (1918).[8] The preference applied broadly to "licenses" (initial and new licenses alike), and was unrestricted in terms of its

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[8] Subsequently the language was changed to make the application of the preference mandatory (". . . the Commission shall give preference . . . .") rather than discretionary. 56 Cong. Rec. 9775 and 9804 (1918). Also, language was added to give states and municipalities a reasonable time to perfect their applications (". . . or shall within a reasonable time be made equally well adapted . . ."). 58 Cong. Rec. 2037-38 (1920).

application "against" the original license. Mr. O. C. Merrill, a principal draftsman of that bill whose authoritative position was recognized by the 1918 Congress[9] and subsequently by this Court,[10] explained that preference language in contemporaneous memoranda. As he put it, "the order of preference should be as follows: (1) the United States . . . (2) the State or municipality . . . (3) the original licensee . . . (4) any other applicant . . . ." Utah Power App. 10a, n. 7. Moreover, as the court of appeals noted, testimony during the hearings on the bill confirmed that the original licensee stood behind states and municipalities in the order of preference. *Id.* at 11a, n. 8.

Following other changes in the bill, noted conservationist Gifford Pinchot proposed the language in issue to assure that section 7 accomplished its "obvious intention . . . to give preference to States and municipalities." Utah Power App. 12a, n. 9. Pinchot's language was included in the bill. Thereafter, Congressman Lee, a manager of the House-Senate Conference Committee, gave the following explanation of section 7(a)'s preference just before the bill's enactment:

> In the development of water powers by agencies other than the United States, the bill gives preference to States and municipalities over any other applicant, both in the case of new developments and in case of acquiring properties of another licensee at the end of a license period.[11]

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[9] *See* H.R. Rep. No. 715, at 14-15.

[10] *See Chemehuevi Tribe of Indians* v. *FPC*, 420 U.S. 395, 418, n. 24 (1975).

[11] 59 Cong. Rec. 6527 (1920) and *see* Utah Power App. 12a, n. 9. Congressman Lee's statement followed verbatim a memorandum prepared for him by O.C. Merrill. Mr. Merrill later prepared another

The foregoing represents only a fraction of the legislative history presented by respondents (including FERC) to the court of appeals. While it is true that the court said much of the material was "weak," it also characterized it as "helpful" (Utah Power App. 12a), and there is *no* legislative history supporting petitioners' view. The thousands of pages of bills, testimony, reports and Congressional colloquy contain no mention of the "limited preference" that petitioners suggest is intended. In fact, as the court of appeals points out, the "limited preference" concept which petitioners contend is embodied in the Act appeared in a different bill (the Shields bill) that was rejected by Congress in passing the Act. *Id.* at 11a.[12] In *First Iowa Hydro-Electric Coop.* v. *FPC*, 328 U.S. 152, 178-79 (1946), this Court determined that Congress' rejection of a proposition expressly contained in the Shields bill was compelling evidence that the same proposition was not intended under the Act.

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memorandum for the President's use, explaining the preference section of the bill as follows (Utah Power App. 12a, n. 9):

> For development by agencies other than the United States preference is given to States and municipalities. A similar preference is given for the acquisition of the properties of other licensees at the end of a license period.

[12] Section 6 of the Shields bill, S. 1419, provided that upon expiration of the permit (*i.e.* license):

> [1] [T]he United States may acquire, take over, and occupy all the property of the grantee . . . or [2] the Secretary of War may grant a new permit to the original permittee . . . or [3] the Secretary of War may grant a permit to another person . . . *subject to the* restrictions and *preferences herein provided* . . . .

See 56 Cong. Rec. 225-26 (1917) (emphasis added). Shields' preferences operated only in the third case, the issuance of a license to "another person." The preferences did not operate against the "original" licensee—precisely the sort of limited preference that petitioners claim is intended under the Act.

2. The Court Of Appeals' Decision Is Consistent With The Decisions Of This Court And The Only Other Court To Have Previously Addressed The Language Of The Act At Issue

As this Court has found, the Act was the product of conservationists, *First Iowa* v. *FPC*, 328 U.S. at 180; *FPC* v. *Union Electric Co.*, 381 U.S. 90, 99 (1965), who strongly opposed potential monopolistic control over water resources by private interests in the form of perpetual licenses and who supported the preservation of the public's water resources for public control. *See* Pinchot, *The Long Struggle for Effective Federal Water Power Legislation*, 14 Geo. Wash. L. Rev. 9, 12, 16 (1945), cited with approval in *First Iowa* v. *FPC*, 328 U.S. at 180, n. 23; *FPC* v. *Union Electric Co.*, 381 U.S. at 98, n. 11, and *Chemehuevi* v. *FPC*, 420 U.S. at 405, n. 10. Accordingly, the Act required limited-term licensing, 16 U.S.C. § 799 and *see United States* v. *FPC*, 345 U.S. 153, 169 (1953) ("Congress was of course aware that, by granting a license to private enterprise, the Federal Power Commission would not commit the site permanently to private development . . . ."); it established favorable provisions for public recapture, 16 U.S.C. §§ 807-808; it specifically outlawed monopolistic activities, 16 U.S.C. § 803h; and it permitted continuing state control over aspects of the public water resources "by careful preservation of the separate interests of the states." *First Iowa* v. *FPC*, 328 U.S. at 174, n. 19 (citing section 7(a)'s preference to states and municipalities as an example of the preservation of state interests.)

The interpretation of section 7(a) that gives states and municipalities a meaningful preference on relicensing after 50 years implements the foregoing general theme underlying the Act as found by this Court. Conversely, petitioners' interpretation is totally at odds; it effectively

eliminates the state and municipal preference in any meaningful sense on relicensing in favor of the perpetual licensing of the original private licensee.[13]

The only other court to have addressed the language of section 7(a)—Judge Clayton in *Alabama Power Co.* v. *Gulf Power Co.*, 283 F. 606, 617 (M.D. Ala. 1922)—described the preference from a contemporaneous view in unrestricted terms wholly consistent with the court of appeals' ruling:

> In further regard to the scope of the [Act], the national policy expressed in it is that the United States may at the expiration of 50 years take over any water project constructed under the act, and that if the United States does not at the end of such period take over the project *the state or municipality under section 7 is given the preferential right over the original lessee to a renewal of the license.* [Emphasis added.]

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[13] Petitioners claim that their view of section 7(a) protects the original licensee's investment in the project much like the act seeks to protect the investment of preliminary permit holders. PG&E Pet. 23. It is true that Congress endeavored to protect preliminary permittees from the operation of the preference during licensing, because the permittees' pre-licensing investment would otherwise be jeopardized. *See Hearings on H.R. 8176 before the House Committee on Water Power*, 65th Cong., 2d Sess. 54-55 (1918). But the licensee is in no such jeopardy on relicensing, since it is entitled to a return of all investment, in addition to its profit, during the entire license term. *See FPC* v. *Niagara Mohawk Power Corp.*, 347 U.S. 239, 242-43 (1954). The fact that Congress took the pains that it did to define compensation upon a license transfer evidences Congressional predilection in favor of such transfers and against petitioners' view that would have the Act perpetuate the original licensee's hold on the project. Indeed the legislative history inveighs heavily against any notion of a perpetual license, which is the end result of petitioners' position.

3. The Declaratory Question Decided Below Is Not An Appropriate Cause For This Court's Attention

a. Petitioners overstate the consequences of the court of appeals' decision.

Aside from challenging the accuracy of the court of appeals' decision, the petitions are all based on generally stated claims that the decision "has a significant adverse impact upon the investor-owned electric utility industry . . . ." Utah Power Pet. 13.[14] Petitioners misstate the case.[15]

Their claims rest on the assumption that "[t]his case affects . . . every licensed project not already owned by a municipal electric utility." Alabama Power Pet. 10. The claim is vastly exaggerated. The preference issue has not even arisen in the overwhelming majority of relicensing cases to date. According to Commission staff figures, of 91 projects which have been relicensed or are presently

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[14] Another petitioner claims that the decision "places in substantial jeopardy" the continuing use of hydroelectric resources by privately-owned utilities. PG&E Pet. 8. And Alabama Power says: "At stake are billions of dollars of investment and future electric charges . . . ." Alabama Power Pet. 11.

[15] Various *amici* offer this same overstated argument with form-letter repetition. For example, the Oregon brief states at page 3: "the practical economic effects of the lower court's decision are immense and adverse." However, in the Merwin proceeding the Oregon Public Utility Commissioner told a different story (Brief of Oregon Public Utility Commissioner at 3, *Pacific Power & Light Co. and Clark-Cowlitz Joint Operating Agency*, 23 FERC (CCH) ¶ 63,037 (April 28, 1983):

> The Commission has held that the preference given to states and municipalities by Section 7(a) applies in all competitive relicensing cases. However, *this preference applies only as a "tie-breaker."* As to whether there is a tie to be broken, the Commission must first determine whether the plans of the state or municipality are "equally well adapted . . . ." [citations omitted]

up for relicensing only eight have involved competing applications by a municipality. *See* Utah Power App. 123a-124a.

Similarly overstated are the economic consequences which petitioners assume will result from this decision based on their theory that each "privately-owned utility . . . may be forced to replace its project with an expensive new thermal generating plant." Utah Power Pet. 15. *See also* PG&E Pet. 9. Petitioners fail to point out that there would be no need to replace capacity where the new licensee was previously served by the prior licensee or where, as in the Merwin case, there is a surplus of power available to that licensee.

In addition, such economic consequences as there may be were treated by the Commission as irrelevant to the strict question of statutory construction involved here. Utah Power App. 77a. For, in the end, no license has changed hands nor will any license necessarily change hands strictly as a result of the court of appeals' decision. The court of appeals (and the Commission below) made it clear that the state and municipal preference is to be applied only after the Commission first decides on the merits that the competing relicense applications are otherwise equal.

One petitioner suggests that application of the preference as a "tie-breaker" will nevertheless carry great significance because the Commission will "avoid the potentially time-consuming and difficult analysis necessary to determine if one applicant is better than another." PG&E Pet. 10, n. 15. But there is no reason to expect the Commission will shirk its responsibility under the Act. FERC has made no such suggestion; neither has it expressed any reservations about the difficulty of selecting a licensee under its view of the statute's standards. Quite

the opposite is true. The Commission pointed out that petitioners' interpretation would leave it without any section 7(a) standards to apply whenever the original licensee competed in a relicensing case. Utah Power App. 67a.

Far from decrying any administrative difficulty under its interpretation, FERC represented to the court of appeals that its resolution of section 7(a)'s meaning fostered administrative efficacy because it enabled potential relicensing applicants to proceed with some certainty in deciding whether to make application. FERC Ct. App. Br. 7, n. 4. Accordingly, the Commission has proceeded with the processing of the Merwin competitive relicensing case. Commenced in September 1981, that case has already gone through a complete adjudicatory proceeding before an administrative law judge, resulting in a very recent decision. As that decision makes clear, the entire case was bottomed on the Commission's prior interpretation of the Act and its directions to proceed. In these circumstances, review by this Court could only upset what is otherwise a settled administrative course.

Finally, in urging this Court to consider this case petitioners rely heavily on arguments that section 7(a)'s preference is bad policy. *See* Utah Power Pet. 13-20; PG&E Pet. 10.[16] As the Commission made clear at the outset of this case, all that has been decided is what Congress established as the controlling policy and enacted into law.

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[16] Petitioners claim the court of appeals' decision "would give municipal systems a preference right that would enable them to take control at relicensing of the nation's privately operated hydroelectric projects, without demonstrating that the public interest would thereby be better served." PG&E Pet. 10; *See* also Utah Power Pet. 18. As we already demonstrated, such statements are flatly erroneous and plainly misread the opinions below.

"Whatever the merits of the [petitioners'] argument as a matter of policy, it is properly addressed to Congress, not to the courts." *Chemehuevi* v. *FPC*, 420 U.S. at 423.

b. The reversal of position by the new Commissioners offers no legitimate basis for this court's intervention.

The Commission unexpectedly reversed its position while the petitions for certiorari were pending, asking the Solicitor General to recommend that the Court grant certiorari, "vacate the judgment of the court of appeals, and remand the case to that court with instructions to remand to the Commission for further consideration." FERC Br. 8. The Solicitor General has not gone that far but does suggest remand to the circuit court "for such reconsideration as it deems appropriate in light of the intervening circumstances." *Id.* at 10. Neither of these extraordinary requests have substantive basis nor do they make practical sense.

(i) Significantly, the Solicitor General does not recommend remand to the Commission[17] nor does he ever say that this case was wrongly decided below and for that reason deserves this Court's attention on the merits. Instead the Solicitor General requests this Court to vacate summarily the decision below and to remand to the court of appeals for reconsideration of "intervening circumstances." *Id.*

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[17] The Solicitor General exercises commendable discretion separating himself from the position of the new Commissioners. In view of the present Commissioners' obvious predisposition on the question ("a majority of the Commissioners appear to be ready to overrule Opinion Nos. 88 and 88A and adopt the contrary position." FERC Br. 9), a remand to the agency for "further consideration" would be an empty gesture that we think would serve only to undermine public confidence in the review process.

What intervening circumstances? There has been no new information discovered to shed new light on the statutory interpretation question at issue. Indeed, the government cites nothing in support of a changed result. Nor has there been any intervening change in the statute, any new law passed or any recent court holding inconsistent with the court of appeals' decision.

The only "intervening circumstances" are that a "majority" of the present Commissioners want to reach a different result. But there is nothing to indicate that this precipitate reaction by some new members is based on the same serious consideration as was given to Opinion No. 88.[18] Moreover, as FERC itself makes clear, this case is still to decide what "the statute requires." FERC Br. I. That question of law is not one that depends on the view of any particular set of Commissioners. Rather, the question turns solely on the meaning of the Act and the intent of Congress in passing that Act. What the new Commissioners may prefer as a matter of policy can in no way advance that inquiry. *Chemehuevi* v. *FPC*, 420 U.S. at 423. As this Court has held, despite what an administrative agency may decide in interpreting its own statute, the courts are the final authorities on issues of statutory construction. *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965).

In short, nothing of substance has intervened to warrant this Court's review, much less the extraordinary relief requested. This eleventh-hour maneuver by new

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[18] Opinion No. 88 was the result of months of consideration after voluminous briefing by the Commission staff, by "virtually all of the investor-owned utilities" (FERC Br. 8-9), and by the publicly-owned utilities, and after an extraordinary full day of oral argument before the entire Commission.

members to reverse a holding of law by the Commission, which it supported and had affirmed in the court of appeals,[19] casts a cloud over agency decision-making and is an imposition on the judicial process. Here, as in prior cases, the effort should not be condoned by this Court. *See American Textile Manufacturers Inst.* v. *Donovan*, 452 U.S. 490, 504, n. 25 (1981); *Greene County Planning Bd.* v. *FERC*, 434 U.S. 1086 (1978) (*see* brief for respondent FERC).

(ii) Under the Solicitor General's approach this Court is asked to take jurisdiction over this case and give it sufficient consideration in order to determine whether the opinion should be vacated, only to remand the case so that the circuit court may consider it for yet a third time. At the end of that process, whatever the outcome, it may be assumed that further petitions to this Court would follow.

That proposal amounts to a senseless waste of time and resources, which frustrates the purpose underlying the case—to bring about certainty on the question of public preference on relicensing. The Solicitor General's proposal is particularly inappropriate in view of the substantial time and resources already expended in the site-specific relicensing proceedings, all bottomed on Opinion No. 88's holdings and directions to proceed.

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[19] As four of the present Commissioners represented to the court below (FERC Ct. App. Br. 7, n.4):

> There is no reason why the purely legal question of statutory interpretation present here would be affected by the facts of a particular case, nor did the Commission indicate its legal conclusion might later change . . . .

CONCLUSION

For these reasons, the petitions for a writ of certiorari should be denied.

Respectfully submitted,

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